90-904

Supreme Court, U.S.
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No.

in the Supreme Court of the United States

October Term, 1990

The Miami Herald Publishing Company, et al.,

Petitioners,

vs.

Department of Revenue, et al.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Florida

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QUESTIONS PRESENTED

I. Does Florida's application of its sales and use tax to magazines but not to newspapers violate the First Amendment?

II. Assuming *arguendo* that Florida's application of its sales and use tax to magazines but not to newspapers violates the First Amendment, does the First Amendment require that the Florida sales and use tax as applied to magazines be invalidated?

LIST OF PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding before this Court are:

Petitioners*:

The Miami Herald Publishing Company
The Florida Press Association
The Tallahassee Democrat, Inc.
Florida Publishing Company
Citrus Publishing Company, Inc.

Respondents:

Department of Revenue
Magazine Publishers of America, Inc.
The Hearst Corporation
Time, Inc.
Golf Digest/Tennis, Inc.
Meredith Corporation
Florida Catholic Conference, Inc.
The Voice Publishing Co., Inc.
The Daughters of St. Paul, Inc.
Florida Baptist Witness, Inc.

All of the above-named parties were parties to the proceeding before the Supreme Court of Florida.

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*The Miami Herald Publishing Company is a division of Knight-Ridder Inc. The Florida Press Association is an association of daily and weekly newspapers published in the State of Florida. The Florida Press Association has no parent company. The Tallahassee Democrat, Inc. is owned by Knight-Ridder Inc. Florida Publishing Company is owned by Morris Communications Corporation. Citrus Publishing Company, Inc. is owned by Landmark Community Newspapers, Inc. None of the petitioners has any non-wholly-owned subsidiaries.

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No.

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OPINIONS BELOW

The opinion of the Supreme Court of Florida in *Department of Revenue v. Magazine Publishers of America, Inc.*, is reported at 565 So.2d 1304 and is reprinted in the appendix at App. A-1-14. The orders of the First District Court of Appeal and the Circuit Court of the Second Judicial Circuit are unpublished. These orders are reprinted in the appendix at App. A-22 and App. A-15-21, respectively.

JURISDICTION

This petition seeks review of a judgment of the Supreme Court of Florida entered May 31, 1990. Timely petitions for rehearing were denied by the Supreme Court of Florida on September 10, 1990. This petition is filed within 90 days of the denial of rehearing, pursuant to 28 U.S.C. §2101(c) and U.S. Supreme Court Rule 13.4.

The jurisdiction of this Court to review the judgment of the Supreme Court of Florida is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 212.05(1)(i), Florida Statutes, provides:

Sales, Storage, use tax. — It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use for consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * *

(i) At the rate of 6 percent on the retail price of magazines sold or used in Florida.

Section 212.06(9), Florida Statutes, provides:

The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphermalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

Section 212.08(7)(w), Florida Statutes, provides:

Sales, rental, use, consumption, distribution, and storage tax; specified exemptions. — The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the

following are hereby specifically exempt from the tax imposed by part I of this chapter.

* * *

(7) MISCELLANEOUS EXEMPTIONS.—

* * *

(w) Newspapers. — Likewise exempt are newspapers.

STATEMENT OF THE CASE

When Florida enacted a sales and use tax for the first time in 1949, the Legislature made the sales of newspapers, but not the sales of magazines, exempt from the tax. An equal protection challenge to the tax was promptly raised on this ground, but the tax — and the newspaper exemption — withstood the attack. *See Gasson v. Gay*, 49 So.2d 525 (Fla. 1950). For the next forty years, with one brief exception,[1] magazines remained subject to the tax while newspapers remained exempt.

In the wake of recent decisions of this Court,[2] the publishers of magazines subject to the Florida sales tax again determined to challenge the constitutionality of the tax. The Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation (collectively, the "Magazines") filed a complaint for declaratory and injunctive relief against the

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[1]The only exception is a brief six-month period in 1987 when newspapers were also subject to the tax. The tax was quickly repealed, however. *See* 1987 Fla. Laws, c. 87-548, §26.

[2]*Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

State of Florida Department of Revenue (the "Department") asking that the Florida sales tax as imposed on magazines, §212.05(1)(i), Fla. Stat. (the "magazine tax"), be declared unconstitutional and its collection enjoined. The Magazines asserted that the magazine tax violated the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment by "singling out" magazines for discriminatory treatment. The Magazines' complaint was premised in primary part on the fact that, unlike magazines, newspapers are statutorily exempted from the Florida sales tax.[3] *See* §212.08(7)(w), Fla.Stat. (the "newspaper exemption").

The Department's response was two-fold. First, the Department defended the constitutionality of the magazine tax as a permissible exercise of legislative discretion. Second, and in the alternative, the Department argued that if the magazine tax were held to discriminate unconstitutionally, the remedy prescribed by Florida law would be the invalidation of the newspaper exemption.

Cross motions for summary judgment were filed by the Magazines and the Department and a hearing was scheduled. After argument, the court announced that it was disposed (i) to hold that the sales and use tax unconstitutionally discriminated between magazines and newspapers and (ii) to remedy the unconstitutionality by invalidating the newspaper exemption and expanding the scope of the tax. Recognizing that this preliminary holding, if sustained, would substantially affect the rights of absent parties, the court declined to finally rule. Instead, the court continued the summary judgment hearing to permit all

[3]The Magazines also asserted that the Florida sales and use tax unconstitutionally differentiated between secular magazines, which were subject to the tax, and religious publications, which were excluded from the tax. *See* §212.06(9), Fla.Stat. The Florida courts ultimately determined not to reach this issue.

interested parties an opportunity to participate in the proceedings.

In response to the court's invitation, The Miami Herald Publishing Company, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company, Inc. (collectively, the "Newspapers") sought and were granted leave to intervene in the action.[4] In motions for summary judgment filed with the court, the Newspapers urged the court to retreat from its preliminary ruling. The Newspapers argued that if the court were to hold that the sales tax was unconstitutionally discriminatory, the constitutionally-mandated remedy for the discrimination was the invalidation of the magazine tax, not the newspaper exemption. In the alternative, the Newspapers argued that the newspaper exemption should be upheld as a valid exercise of legislative discretion.

After extensive briefing and argument, the court determined to adhere to its previously expressed view that the Florida sales tax unconstitutionally discriminated between magazines and newspapers. App. A-17-19. On the question of remedy, however, the court was persuaded that the magazine tax, rather than the newspaper exemption, should be invalidated. The court expressly rejected the Department's contention that Florida law controlled the court's choice of remedy, instead holding that the First Amendment mandated the invalidation of the burdensome tax. App. A-19-20. Thus, on November 8, 1989, the court entered final summary judgment in favor of the Magazines and the Newspapers, invalidating the magazine tax and enjoining its collection. App. A-15-21. By its own terms, the effect of the court's order was stayed pending appeal by the Department. App. A-20.

[4]Florida Catholic Conference, Inc., Voice Publishing Company, Inc., Daughters of St. Paul, Inc. and the Florida Baptist Witness also sought and were granted leave to intervene.

The Department filed a notice of appeal invoking the jurisdiction of the appropriate intermediate appellate court, the First District Court of Appeal. Rather than consider the merits of the appeal, however, the First District elected to certify the trial court's judgment directly to the Supreme Court of Florida for immediate review. App. A-22.

On May 31, 1990, the Supreme Court of Florida announced its decision. Relying on this Court's decisions in *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 107 S.Ct. 1722 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), the court held that "Florida's statutory differentiation between secular magazines and newspapers for purposes of sales taxation burdens rights protected by the first amendment." *Department of Revenue v. Magazine Publishers of America, Inc.,* 565 So.2d 1304, 1306 (Fla. 1990), App. A-4. The court expressly rejected the argument offered by the Department and the Newspapers that the "subsidy" analysis set forth in *Regan v. Taxation with Representation of Washington, Inc.,* 461 U.S. 540 (1983), and in Justice Scalia's dissenting opinion in *Arkansas Writers,* 107 S.Ct. at 1731 (Scalia, J., dissenting), should control. 565 So.2d at 1308 n.6, App. A-8-9. The court concluded that the trial court's application of the "strict scrutiny" standard was correct and that, in the absence of a compelling governmental interest, the differential taxation of magazines and newspapers was unconstitutional. Accordingly, the court affirmed that portion of the trial court's order which concluded that "chapter 212, Florida Statutes (1987 & Supp. 1988), unconstitutionally differentiates between magazines and newspapers, burdening first amendment rights." 565 So.2d at 1309, App. A-10 (footnote omitted).

Turning next to the question of remedy, the supreme court expressly rejected the trial court's conclusion that this Court's First Amendment taxation decisions mandated the

invalidation of the burdensome magazine tax. The Florida court admitted that in *Arkansas Writers*, this Court "struck the tax rather than eliminate the exemptions," but reasoned that "no language in the [*Arkansas Writers*] decision indicates that such a result is *always* constitutionally mandated." 565 So.2d at 1309, App. A-12 (emphasis added). Instead, the court agreed with the Department that Florida law governed. Applying section 212.21, Florida Statutes (1987), the Court concluded that "as between the imposition of the tax or the granting of an exemption, the tax shall prevail." 565 So.2d at 1310, App. A-14. Accordingly, the court reversed that portion of the trial court's order which concluded that "the appropriate remedy is to strike the tax on magazines" and instead struck the newspaper exemption. 565 So.2d at 1310-11, App. A-14.

Timely petitions for rehearing were filed by the Newspapers and the Magazines which petitions were denied by the Supreme Court of Florida without comment on September 10, 1990. App. A-23-24.

REASONS FOR GRANTING THE WRIT

In *Arkansas Writers' Project, Inc. v. Ragland*, this Court considered the constitutionality of a state sales and use tax which applied to some magazines but from which other magazines and all newspapers were statutorily exempt. The Court held that Arkansas' selective imposition of its sales tax on some magazines but not others violated the First Amendment and invalidated the tax on this ground alone. Because this ruling, and the consequent invalidation of the tax, "eliminate[d] the differential treatment of newspapers and magazines," the Court found it unnecessary to "decide whether a distinction between different types of periodicals" for sales tax purposes would also violate the First Amendment. 107 S.Ct. at 1729.

In recent months, the differential taxation question expressly left open in *Arkansas Writers* has been asked and answered with varying results in an array of state courts. This case is the third in a matter of months to reach this Court. As of this writing, the Court has accepted jurisdiction in one of the cases and the other (actually a consolidated pair of companion cases) is awaiting a decision on jurisdiction.

The first case is *Medlock v. Pledger*, 301 Ark. 483, 785 S.W. 2d 202 (Ark. 1990), *cert. granted*, 111 S.Ct. 41 (U.S. Oct. 1, 1990) (Nos. 90-29, 90-38). In *Pledger*, the Arkansas Supreme Court held that a sales tax which was imposed on cable television but from which magazines and newspapers were exempt did *not* violate the First Amendment. However, the court held that the same sales tax *did* violate the First Amendment where no comparable tax was imposed on satellite television. Both issues have been presented to this Court and oral argument is scheduled for January 9, 1991.

The consolidated companion cases awaiting this Court's decision on jurisdiction are *Newsweek, Inc. v. Celauro*, 789 S.W. 2d 247 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273), and *Southern Living, Inc. v. Celauro*, 789 S.W. 2d 251 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273). In *Newsweek* and *Southern Living*, the Tennessee Supreme Court held that a sales tax which was imposed on magazines but from which newspapers were exempt violated the First Amendment. Accordingly, the court invalidated the Tennessee tax.

This case presents, in large part, the same issues currently before the Court in *Pledger* and *Newsweek*. The Supreme Court of Florida, like the Tennessee Supreme Court, held that a state sales tax which applied to magazines but from which newspapers were exempt violated the First

Amendment. Unlike the Tennessee court, however, the Florida court did not invalidate the unconstitutional tax. Instead, the court invalidated the newspaper exemption, thereby subjecting both magazines and newspapers to the Florida sales tax.

Nor is this case likely to be the last to reach this Court before the differential taxation issue left open in *Arkansas Writers* is addressed. On September 19, 1990, the Iowa Supreme Court upheld the constitutionality of a sales tax which was imposed on magazines but from which newspapers were exempt. *Hearst Corp. v. Iowa Dep't of Revenue and Finance*, 461 N.W. 2d 295 (Iowa 1990). In contrast with the Arkansas, Tennessee and Florida courts, the Iowa court held that *Arkansas Writers* and *Minneapolis Star* were not controlling. Instead, the *Hearst* court, following the rationale expressly rejected by the Florida court in this case, applied the "subsidy" analysis set forth in *Regan* and in Justice Scalia's dissent in *Arkansas Writers*. The conflict among the state courts on this fundamental question is clear.

CONCLUSION

Pledger, Newsweek, and now this case all present this Court with the question left open in *Arkansas Writers*: Can a state, consistent with the First Amendment, exempt one segment of the media from its sales tax but not exempt another where the only difference between the media is the format of their communicative activity?

In addition, this case presents the question implicitly answered in *Arkansas Writers* but never explicitly addressed by this Court: If it is determined that a state's taxation of one segment of the media and exemption from taxation of another violates the First Amendment, does the

First Amendment require the invalidation of the burdensome tax?

Both questions are in need of answers. Most states have sales taxes, and most of them exempt some segments of the media but not others. Constitutional challenges to these taxes have proliferated in recent years and are likely to continue to do so until these issues are resolved. Accordingly, the Newspapers would respectfully request that this petition for writ of certiorari be granted or, in the alternative, that consideration of this case by stayed pending the Court's disposition of *Pledger v. Medlock*.

Respectfully submitted,

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Dated: December 7, 1990

Appendix A

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APPENDIX A

DEPARTMENT OF REVENUE,

Appellant,

v.

MAGAZINE PUBLISHERS OF AMERICA, INC., et al.,

Appellees.

No. 75201.

Supreme Court of Florida.

May 31, 1990.

Rehearing Denied Sept. 10, 1990.

* * *

EHRLICH, Chief Justice.

Magazine Publishers of America, Inc.; The Hearst Corporation, Time, Inc.; Golf Digest/Tennis, Inc.; and Meredith Corporation (Magazine Publishers) filed suit against the Florida Department of Revenue (Department) challenging the constitutionality of the imposition of sales tax on the retail sale of secular magazines pursuant to chapter 212, Florida Statutes (1987). The trial court granted the Magazine Publishers' motion for summary judgment.[1] In its order, the trial court found that "Chapter 212 clearly imposes a differential tax on the press, singling out magazines for taxation while exempting newspapers." The trial court also found that the Department failed to assert a compelling state interest sufficient to support the differential tax. Accordingly, the trial court held the tax

[1]The summary judgment motions of The Miami Herald and the Florida Press Association (Newspapers), intervenors in the action, were also granted, to the extent that they asserted that the sales tax on magazines should be invalidated. The circuit court denied the amended motion for summary judgment filed by the Department.

imposed on magazines to be an unconstitutional violation of the first amendment of the United States Constitution and ordered that the Department be enjoined from collecting the tax on magazines. Upon appeal by the Department, the First District Court of Appeal certified the question involved to be one of great public importance that requires immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla.Const.

Under Florida's sales and use taxation scheme, sales tax is levied on retail sales of secular magazines while retail sales of newspapers are exempt from taxation. §§ 212.05(1)(i), .06(9), .08(7)(w), Fla.Stat. (1987 & Supp.1988). Section 212.05(1)(i), Florida Statutes (Supp.1988), provides:

> (1) . . . [A] tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
>
> . . .
>
> (i) At the rate of 6 percent on the retail price of magazines sold or used in Florida.

Section 212.08(7)(w), Florida Statutes (Supp.1988), which sets forth miscellaneous exemptions, provides:

> (w) *Newspapers*—Likewise exempt are newspapers.

The Magazine Publishers assert that the differential taxation of magazines violates the free speech and free press clauses of the first amendment and the equal protection clause of the fourteenth amendment to the United States Constitution, as well as article I, section 2 and 4, of the Florida Constitution.[2]

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[2]Count I of Magazine Publishers' complaint also alleged that taxation of secular magazines, while exempting religious magazines, had a chilling effect on first amendment rights. After the trial court indicated that it might consider the validity of the religious publication exemption, Florida Catholic Conference, Inc.; The Voice Publishing Co., Inc.; Daughters of St. Paul, Inc., and The Florida Baptist Witness, Inc., filed motions to

(Footnote continued on next page)

The Department and the Newspapers contend that the statutory distinction between magazines and newspapers for purposes of the Florida sales and use tax is constitutionally permissible. These parties argue that the trial court erred in concluding that the appropriate standard by which to judge the differential treatment of the publications is a "strict scrutiny" standard, rather than a "rational basis" test, and in concluding that the differential taxation of magazines is unconstitutional under the first amendment of the United States Constitution. We reject the position asserted by the Department and the Newspapers.

The first amendment of the United States Constitution provides that Congress shall make no law abridging freedom of speech or freedom of the press. The first amendment clearly "does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369, 75 L.Ed.2d 295 (1983). However, "a discriminatory tax on the press burdens rights protected by the First Amendment." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221,

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(Footnote continued from previous page)
intervene, which were granted by the court. Subsequent to the intervention, Magazine Publishers filed a motion for leave to amend the complaint to delete all reference in the pleadings to the exclusion of religious publications. The court denied the motion for leave to amend, but later granted the intervenors' motion to strike all evidence concerning the exclusion of religious publications, concluding that the issue of the constitutionality and application of section 212.06(9), Florida Statutes (1987) (religious publication exclusion), was not properly placed in issue by the pleadings in this action. No reference was made to the religious publication exclusion in the order granting final summary judgment and no challenge has been raised in this proceeding to the trial court's order granting the motion to strike. Accordingly, we decline to consider the constitutionality or application of the religious publication exclusion at this point in time.

107 S.Ct. 1722, 1726, 95 L.Ed.2d 209 (1987) (footnote omitted). It is clear from the Court's analysis in both *Ragland* and *Minneapolis Star* that Florida's statutory differentiation between secular magazines and newspapers for purposes of sales taxation burdens rights protected by the first amendment.

In *Minneapolis Star,* Minnesota enacted a "use tax" on the cost of paper and ink products consumed in the production of a publication as part of the state's sales and use taxation scheme. A subsequent amendment exempted the first $100,000 worth of ink and paper consumed in any calendar year. After the enactment of the $100,000 exemption,

> 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax. In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper.

Minneapolis Star, 460 U.S. at 578–79, 103 S.Ct. at 1368 (citations omitted). The Court rejected the state's argument that the tax was valid, finding two distinct forms of discrimination.

> First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treated the press differently from other enterprises.[3] Second, the tax targeted a small group of newspapers. This was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers

[3]Ink and paper used in publications were the only items that were components of goods to be sold at retail which were subject to the use tax.

> pay any tax at all, and even fewer pay any significant amount of tax."

Ragland, 107 S.Ct. at 1727 (citations omitted). Thus, the first type of discriminatory tax identified in *Minneapolis Star* is a special tax that applies only to publications protected by the first amendment. 460 U.S. at 581, 103 S.Ct. at 1369. The second type of discriminatory tax identified is one that is tailored in such a way that it singles out or targets individual publications within the press. *Id.* at 591, 103 S.Ct. at 1375.

The Court held that such differential, discriminatory taxation of the press places a burden on the interests protected by the first amendment. *Id.* at 585, 103 S.Ct. at 1371. As the Court noted:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585, 103 St.Ct. at 1371 (citations omitted). The Court also recognized the great potential for abuse that would be presented by recognizing a power in the state to tax selected members of the press. *Id.* at 592, 103 S.Ct. at 1375.

In *Ragland*, the Court again addressed the issue of differential taxation of publications protected by the first amendment. The Arkansas sales tax scheme examined by the Court in *Ragland* taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals. The question presented was whether Arkansas' system of selective taxation of publications violated the First Amendment's guarantee of freedom of the press. The Court again emphasized the danger of abuse by the state that is posed by differential treatment of entities in the press. The Court noted that both types of discrimination identified in *Minneapolis Star* could be established even where there is no evidence of an improper censorial motive "because selective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State." *Ragland*, 107 S.Ct. at 1727. The Arkansas tax scheme resulted in only a few Arkansas magazines paying any sales tax. The Court concluded that "[b]ecause the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in *Minneapolis Star*." *Id.* In other words, although the tax is nominally imposed on receipts from sales of all tangible personal property, it targets individual members of the press. *Id.* The tax imposed on selective magazines was declared invalid.

The holding in *Ragland* eliminated the differential treatment between general interest magazines and the exempt special interest magazines. Because the tax on general interest magazines was declared invalid, magazines previously subject to sales tax would be treated no differently for tax purposes than the magazines specifically exempted from the tax. This holding also had the effect of eliminating the differential treatment of newspapers and magazines; neither general interest magazines, special interest magazines, nor newspapers would be subject to sales tax. Accordingly, the Court declined to decide whether a

distinction between different types of periodicals presented an additional basis for invalidating the sales tax as applied to the press. *Id.* 107 S.Ct. at 1729.

Ragland nonetheless mandates affirming the trial court's ruling below that the scheme at issue in the case at bar is unconstitutional under the first amendment. *Ragland* stands for the proposition that the first amendment prohibits a state from identifying a class or group of publications protected by the first amendment and imposing a differential, discriminatory tax on some members of the class or group.[4] *Ragland* clearly indicates that a state may not tax some types of magazines while exempting other types of magazines. The same first amendment concerns are present when a state tax scheme differentiates between different types of periodicals, i.e., taxing sales of magazines while exempting sales of newspapers.[5]

[1] Like the Arkansas sales tax at issue in *Ragland*, the Florida sales tax cannot be characterized as a nondiscriminatory tax on the receipts of magazines because it is not evenly applied; the scheme treats some periodicals

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[4]As the Court noted at the outset of its analysis in *Ragland*, the "First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause. However, since Arkansas' sales-tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 1726 n. 3, 95 L.Ed.2d 209 (1987).

[5]It is clear that the Court's conclusion in *Ragland* was not based merely on the fact that the differentiation between the magazines was content based. The Court first determined that the tax at issue in *Ragland* was discriminatory because it was not evenly applied to all magazines, thus suffering from the second type of discrimination identified in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). The fact that the basis on which Arkansas differentiated between magazines depended upon the content of the magazine merely served to make the differentiation "particularly repugnant to First Amendment principles," such that the case involved "a more disturbing use of selective taxation than *Minneapolis Star*." *Ragland*, 107 S.Ct. at 1727.

protected by the first amendment less favorably than other periodicals. Florida's scheme accordingly suffers from the second type of discrimination identified in *Minneapolis Star*, targeting individual members of the press for selective taxation. The decisions of the United States Supreme Court "clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." *Ragland*, 107 S.Ct. at 1726. As the Court stated in *Minneapolis Star*, "we think that recognizing a power in the State not only to single out the press but also to tailor the tax *so that it singles out a few members of the press* presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 460 U.S. at 592, 103 S.Ct. at 1375.

Because the differential taxation of magazines under Florida's sales tax scheme urdens rights protected by the first amendment, the trial court correctly applied the "strict scrutiny" standard in determining whether such differential taxation is permissible. "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." *Minneapolis Star*, 460 U.S. at 592-93, 103 S.Ct. at 1376. "In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Ragland*, 107 S.Ct. at 1728.[6]

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[6]The reliance upon *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), by the Department and the Newspapers is misplaced. In *Regan*, Taxation with Representation of Washington (TWR), a nonprofit corporation, brought a free speech clause challenge against a federal regulation which provided that taxpayers who contribute to charitable organizations that engage in substantial lobbying to advance their exempt purposes can not deduct the amount of their contributions on their federal income tax returns. Contributions made to charitable organizations that do not engage in substantial lobbying can be deducted by taxpayers on their federal income

(Footnote continued on next page)

Under a "strict scrutiny" analysis, the differential taxation of the press cannot be sustained "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation," *Id.* The Department, in reliance upon its argument that the proper standard for analyzing the differential taxation of publications at issue is the "rational basis" standard, did not assert any compelling interest which may justify the differential treatment. The only interest asserted to justify the scheme, under any standard, was a significant public interest in promoting publishers who engage in the immediate dissemination of news; in publishing news while it is new. This asserted interest is clearly not a compelling governmental interest. It is questionable whether this asserted interest would survive even a rational relation

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(Footnote continued from previous page)
tax returns. The Court rejected TWR's first amendment argument, noting that TWR was not denied "any independent benefit on account of its intention to lobby." *Id.* at 545, 103 S.Ct. at 2001. The Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity." *Id.* at 546, 103 S.Ct. at 2001.

We agree with the Magazine Publishers that it "is noteworthy that the Court decided *Regan* approximately two months after the decision in *Minneapolis Star*, yet *Regan* made no reference whatsoever to *Minneapolis Star*." Answer Brief of Appellees MPA, Hearst, Time, Golf Digest, and Meredith at 14. The majority decision in *Ragland*, issued approximately four years after the decision in *Regan*, makes no mention of *Regan*. Justice Scalia's dissenting opinion in *Ragland* sets forth the argument that the Court's opinions "have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' and the general rule that 'a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny,' " relying upon *Regan*. *Ragland*, 107 S.Ct. at 1731 (Scalia, J., dissenting) (citation omitted). This argument, which is similar to the argument here asserted by the Department and the Newspapers, warranted no comment from the majority. Clearly a majority of the Court view *Ragland* and *Regan* as involving different issues under the first amendment.

analysis. As recognized in *Newsweek, Inc. v. Celauro*, 789 S.W.2d 247, 250 (Tenn.1990):

> There is nothing to suggest that newspapers require an exemption in order to furnish such immediacy in bringing the news to the public. Further, there is no basis for giving immediate news a privileged position over other avenues of news reporting which is accompanied by more deliberative analysis or commentary. It is not a legitimate function of the government to decide which information furthers better the public interest. Moreover, the exemption statute is not narrowly tailored to meet the asserted governmental interest. Newsweek publishes as frequently as many exempt newspapers. With the application of current day technology, its "news" is no more stale than that of newspapers publishing weekly.

Accordingly, we affirm that portion of the trial court's order which concludes that the rationale offered by the Department for the differential treatment does not serve a compelling state interest and that chapter 212, Florida Statutes (1987) & Supp.1988), unconstitutionally differentiates between magazines and newspapers, burdening first amendment rights.[7]

[2] The Department next contends that if the trial court was correct in its conclusion that differential treatment is invalid, the proper solution is to sever the exemption for newspapers. We agree. Magazine Publishers erroneously contend that "[u]nder federal constitutional law, it is the Florida sales tax on magazines that impermissibly burdens freedom of the press and that must be stricken to remedy the constitutional defect." As noted above, Florida's

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[7]We reject the Department's contention that the trial court erroneously "overruled" *Gasson v. Gay*, 49 So.2d 525 (Fla.1950). As is obvious from the authority cited therein, the decision in *Gay* dealt only with an equal protection challenge. But to the extent it is inconsistent, we recede therefrom.

sales tax *scheme* unconstitutionally burdens first amendment interests due to the differential treatment of magazines and newspapers. It does not follow from this that it is the tax on magazines that is unconstitutional.

The trial court concluded that striking the tax on magazines was the mandated result under federal constitutional law. In so concluding, the trial court erroneously relied upon three decisions of the United States Supreme Court. In the first, *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the state of Louisiana enacted a license tax applicable only to publishers in the business of selling or charging for advertising when published in any type of publication with a designated circulation volume. Removing the internal "exemption" for smaller papers from the license tax would not have rendered the advertising license tax an "ordinary form of taxation." Accordingly, the Court affirmed the decree declaring the license tax unconstitutional. Similarly, in *Minneapolis Star*, the state created a special tax which had the effect of "singling out publications for treatment that is . . . unique in Minnesota tax law" rather than applying its general sales and use tax to newspapers. 460 U.S. at 581, 103 S.Ct. at 1369. The special use tax exempted the first $100,000 of ink and paper used. Removing this internal exemption would not have rendered the tax one of general applicability. Rather, the tax would still have been applicable only to publications. Although striking the tax was the result reached in *Grosjean* and *Minneapolis Star*, the same result is not constitutionally mandated in the case at bar, which is factually distinguishable. Under Florida's sales tax scheme, magazines are not singled out for taxation. Rather, other sales of tangible personal property involving first amendment expression, such as books, periodicals, journals, advertising supplements, and information services, are subject to the tax.

Finally, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the state sales tax scheme taxed general interest magazines, but specifically exempted newspapers and religious, trade, professional, and sports magazines. The Court held "that the State's selective application of its sales tax to magazines is unconstitutional and therefore invalid." *Id.* 107 S.Ct. at 1729. The Court stated, in conclusion, that "the tax is therefore invalid under the First Amendment." *Id.* 107 S.Ct. at 1730. Although it appears that the Court struck the tax rather than eliminate the exemptions, no language in the decision indicates that such a result is always constitutionally mandated. Indeed, it appears that the Court is of the opinion that there is no mandatory course of action in a case such as the one at bar. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), the state argued that a publisher of a general interest magazine had no standing to challenge the state's sales tax exemption for periodicals distributed by a religious faith that consist wholly of writings promulgating the teaching of the faith. The state claimed that if the scheme were improper, the proper course under state law would be to remove the exemption, rather than to extend it to nonreligious periodicals. The Court responded that

> [i]t is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether.

Id. 109 S.Ct. at 896.

We conclude that the correct response in the case at bar under Florida law is elimination of the exemption. Section 212.05(1)(a), Florida Statutes (1987), levies a tax on "the sales price of each item or article of tangible personal property when sold at retail in this state." Section 212.05(1)(i) specifically states that sales of magazines are

taxable transactions.[8] Section 212.21, Florida Statutes (1987), expressly declaring the legislative intent of chapter 212, provides in part:

> (2) It is hereby declared to be the *specific legislative intent to tax each and every sale,* admission, use, storage, consumption or rental levied and *set forth in this chapter,* except as to such sale, admission, use, storage, consumption, or rental, as shall be specifically exempted therefrom by this chapter, subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that *should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption or rental or any of them exempted or attempted to be exempted from the tax or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition therefor to the same extent as if such exemption or attempted exemption had never been included herein.*
>
> (3) It is further declared to be the specific legislative intent *to exempt from the tax or taxes* or from the operation or the imposition thereof *only such sales, admissions, uses, storages, consumption or rentals in relation to or in respect of the things set forth by this*

[8]Section 212.05(1)(i), Florida Statutes (1987), may be considered superfluous. It is not disputed that magazines are within the definition of tangible personal property set forth in section 212.02(20), Florida Statutes (1987), and that such transactions would therefore be taxable under section 212.05(1)(a) without regard to section 212.05(1)(i). Section 212.05(1)(i), however, reinforces the legislative intent expressed in section 212.05(1)(a) that sales of magazines be taxed.

> *chapter as exempted from the tax* to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes . . . except such sales, admissions, uses, storages, consumptions or rentals as are specifically exempted therefrom by this chapter to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States.

(Emphasis added.) Section 212.21 makes it unmistakably clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail.

Accordingly, we affirm that portion of the trial court's order which holds that chapter 212, Florida Statutes (1987), unconstitutionally differentiates between magazines and newspapers, thereby impermissibly burdening first amendment rights. Having concluded that the appropriate remedy under Florida law is to strike the exemption granted to newspapers pursuant to section 212.08(7)(w), Florida Statutes (Supp.1988), we reverse that portion of the trial court's order which concludes that the appropriate remedy is to strike the tax imposed on magazines. This decision shall become final ninety days after issuance of mandate.

It is so ordered.

OVERTON, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

McDONALD, J., did not participate in this case.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO. 88-2442

MAGAZINE PUBLISHERS OF AMERICA, INC.,
THE HEARST CORPORATION, TIME, INC.,
GOLD DIGEST/TENNIS, INC. AND
MEREDITH CORPORATION,

Plaintiffs,

vs.

THE STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Defendant.

FINAL SUMMARY JUDGMENT

This cause came before the Court on Motion for Summary Judgment of Plaintiffs Magazine Publishers of America, Inc., et al., Amended Motion for Summary Judgment of Defendant State of Florida Department of Revenue (the "Department"), Motion for Summary Judgment of Intervenor The Miami Herald Publishing Company (the "Miami Herald"), and Motion for Summary Judgment of Intervenor The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company, Inc. (the "Florida Press Association"). Upon consideration of the memoranda and argument of all parties, the Court hereby grants the summary judgment motion of plaintiffs. The Court also grants the summary judgment motions of intervenors the Miami Herald and the Florida Press Association to the extent that they assert that the sales tax on magazines should be invalidated. The amended motion for summary judgment of the Department is denied.

Background

Plaintiff Magazine Publishers of America, Inc. ("MPA") is a national trade association comprised of 213 publishers who publish magazines and other publications sold at newsstands and by subscription. Most, if not all, of these publishers sell magazines and other publications to Florida residents. MPA members provide a broad coverage of domestic and international news and offer editorial opinions and in-depth analyses of topical issues. Plaintiffs the Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc. and Meredith Corporation are all private, non-Florida corporations engaged in the business of publishing magazines and other publications many of which are sold in Florida by subscription and through Florida retailers. Each of these plaintiffs are members of MPA.

Plaintiffs challenge the constitutionality of the sales and use tax imposed on magazines sold or used in the State of Florida pursuant to Chapter 212, Florida Statutes. They assert that because there is differential treatment of magazines and newspapers for sales and use tax purposes, that is, magazines are subject to the tax while newspapers are exempt, the tax violates the Free Press Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as their Florida constitutional counterparts. They ask that collection of the tax on magazines be enjoined.

Defendant Department of Revenue administers the provisions of Chapter 212, Florida Statutes. The Department collects the tax on the sale and use of magazines sold or used in Florida.

The Department contends that the present tax scheme is constitutional and that the differentiation between newspapers and magazines is a permissible legislative classification. In the alternative, the Department contends that if the tax scheme is unconstitutional, the Court should

invalidate the newspaper exemption rather than enjoin collection of the tax on the sale or use of magazines.

Plaintiffs and the Department filed cross motions for summary judgment which were heard on July 12, 1989. At that time, the Court ordered further briefing and the hearing was continued until October 5, 1989.

After the first summary judgment hearing, the Miami Herald and the Florida Press Association intervened. The Miami Herald, a division of Knight-Ridder Inc., publishes *The Miami Herald*, a daily newspaper of general circulation in south Florida. The Florida Press Association is an association of Florida's daily and weekly newspaper publishers. Both the Miami Herald and the other members of the Florida Press Association disseminate news and information to the public.

Both the Miami Herald and the Florida Press Association argue that if the tax is unconstitutional, the tax must be invalidated and the newspaper exemption should remain intact. In the alternative, they contend that the present tax scheme is constitutional and the newspaper exemption should not be disturbed.

Discussion

The issue before this Court is two-fold: (i) does Chapter 212, Florida Statutes, unconstitutionally differentiate between magazines (which are subject to the tax) and newspapers (which are exempt), and (ii) assuming Chapter 212 is unconstitutional, should the Court invalidate the tax on magazines or the exemption for newspapers. These issues are addressed separately below.

I. Is Chapter 212 unconstitutional?

Chapter 212, Florida Statutes, imposes a sales and use tax on goods sold or used in Florida. Chapter 212 also establishes exemptions from the tax. Specifically, section 212.05(1)(i), (the "magazine tax") provides:

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

* * *

(i) At the rate of 6 percent on the retail price of magazines sold or used in Florida.[1]

Section 212.08(7)(w) (the "newspaper exemption") provides:

(w) *Newspapers.* — Likewise exempt are newspapers.

Chapter 212 thus treats magazines and newspapers — both members of the press — differently, taxing one and exempting the other.

The Magazines have challenged the tax on two constitutional grounds — the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. When the United States Supreme Court has addressed similar claims of differential taxation of the press, it has routinely conducted a First Amendment analysis, finding it unnecessary to reach the Equal Protection Clause. *See Arkansas Writers' Project, Inc. v. Ragland,* 107 S.Ct. 1722, 1726 n.3 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 585 n.7 (1983); *see also Grosjean v. American Press Co.,* 297 U.S. 233, 251 (1936). This Court must do the same.

In order to survive First Amendment scrutiny, a tax on the press must be of general applicability unless the differential taxation is supported by a compelling state interest which cannot be accomplished without differential taxation. *Arkansas Writers' Project, Inc. v. Ragland, supra;*

---

[1]Section 212.05(1)(a), Florida Statutes, generally imposes a sales and use tax on the sale or use of any items of tangible personal property sold or used in Florida. To the extent that this provision also imposes a sales and use tax on magazines, it is included within this Court's references herein to the magazine tax.

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, supra. "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. at 592–93.

Chapter 212 clearly imposes a differential tax on the press, singling out magazines for taxation while exempting newspapers. The question therefore arises whether such differential treatment is justified by a compelling state interest. The only rationale offered by the Department is timeliness — that is, that newspapers are published with greater frequency than magazines. The court rejects this rationale. Although timeliness may be one way to distinguish between some magazines and some newspapers, it does not serve a compelling state interest sufficient to support the differential tax imposed by Chapter 212.[3]

II. What is the appropriate remedy?

Having held that Chapter 212 unconstitutionally discriminates between newspapers and magazines, the Court must determine what remedy to afford. Once again, the First Amendment provides the answer.

When a tax or other regulation is held to violate the First Amendment, the constitutionally-mandated remedy is to strike the unconstitutional tax or regulation. Thus, in each of the United States Supreme Court cases to address the issue of discriminatory taxation of the press under the First Amendment, it is the tax that has been invalidated. *See Arkansas Writers,* 107 S.Ct. at 1730 (holding "the *tax* . . . invalid under the First Amendment") (emphasis added); *Minneapolis Star,* 460 U.S. at 593 (holding "the *tax* violates the First Amendment") (emphasis added); *Grosjean,* 297 U.S. at 251 (concluding that "the act imposing the *tax* . . . is

[3]The Court also holds, although the resolution of the Plaintiffs' claim under the First Amendment renders the analysis unnecessary, that the magazine tax is invalid on equal protection grounds.

unconstitutional") (emphasis added). This Court is therefore bound to and does hereby invalidate the magazine tax and enjoin its collection.

The Department urges this Court to strike the newspaper exemption and preserve the tax. The Department relies chiefly on section 212.21, Florida Statutes — the so-called "severability provision" of Chapter 212. The Court holds that section 212.21 does not control the Court's determination of the appropriate remedy in this case because of the First Amendment concerns raised by Chapter 212.

Conclusion

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that

1. Plaintiffs' motion for summary judgment is granted and final summary judgment is hereby entered in their favor;

2. The motions for summary judgment of the Miami Herald and the Florida Press Association are granted to the extent that they assert that the tax on magazines must be invalidated and final summary judgment is hereby entered in their favor;

3. The Department's Amended Motion for Summary Judgment is denied and final summary judgment is hereby entered against the Department;

4. The Department is enjoined from collecting the sales and use tax on magazines imposed by Chapter 212; and

5. This Order is stayed pending appeal. The Court retains jurisdiction to consider plaintiffs' claim for attorneys' fees in Count III of the Complaint and for the award of costs.

Done and Ordered in Chambers this 8th day of November, 1989.

/s/ George S. Reynolds, III
George S. Reynolds, III
Circuit Judge

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32301

Telephone (904) 488-6151

DATE December 19, 1989

CASE NO. 89-3115
88-2442

STATE OF FLORIDA, DEPARTMENT OF REVENUE

appellant/petitioner

vs.

MAGAZINE PUBLISHERS OF AMERICA, INC., et al.

appellee/respondent

ORDER

Pursuant to Rule 9.125, Florida Rules of Appellate Procedure, this court certifies that this cause requires immediate resolution by the Florida Supreme Court because the issue pending in this court is of great public importance.

By order of the court
RAYMOND E. RHODES, CLERK

(S E A L)

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Kevin J. Odonnell
Laura Besvinick
Cecil L. Davis, Jr.
Paul F. Hartsfield
Sid J. White

James M. Ervin, Jr.
William L. Hyde
Timothy J. Warfel

/s/ Sondra Joyner
Deputy Clerk

SUPREME COURT OF FLORIDA

MONDAY, SEPTEMBER 10, 1990

CASE NO 75,201

Circuit Court No. 88-2442
(Leon)

(Certified by —
District Court of Appeal,
1st District — No. 89-3115)

DEPARTMENT OF REVENUE,

Appellant,

v.

MAGAZINE PUBLISHERS OF AMERICA, INC., et al.,

Appellees.

Appellees MAGAZINE PUBLISHERS OF AMERICA, INC., THE HEARST CORPORATION, TIME, INC., GOLF DIGEST/TENNIS, INC. and MEREDITH CORPORATION, Appellees MIAMI HERALD PUBLISHING COMPANY, and Appellees FLORIDA PRESS ASSOCIATION, TALLAHASSEE DEMOCRAT, INC., FLORIDA PUBLISHING COMPANY, and CITRUS PUBLISHING COMPANY's Motions for Rehearing filed in the above cause are hereby denied.

SHAW, C.J., OVERTON, EHRLICH, BARKETT, GRIMES and KOGAN, JJ., concur

McDONALD, J., did not participate in this case

TC

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Raymond E. Rhodes, Clerk
Hon. George S. Reynolds, III, Judge

Kevin J. Odonnell, Esquire
James M. Ervin, Jr., Esquire
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Timothy J. Warfel, Esquire
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A True Copy

TEST:

(S E A L)

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-904

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

The Miami Herald Publishing Company, et al.,

Petitioners,

v.

Florida Department of Revenue, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Florida Department of Revenue

QUESTIONS PRESENTED

The Petitioners offer two Questions Presented which are as follows:

I. Does Florida's application of its sales and use tax to magazines but not to newspapers violate the First Amendment?

II. Assuming arguendo that Florida's application of its sales and use tax to magazines but not to newspapers violates the First Amendment, does the First Amendment require that the Florida sales and use tax as applied to magazines be invalidated?

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OPINION BELOW

Respondent, the Florida Department of Revenue (Department) accepts Petitioners', The Miami Herald Publishing Company, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company's (Newspaper Publishers'), statement.

JURISDICTION

Respondent accepts Petitioners' statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioners' statement, except that Respondent asserts that the following statutory provision is not involved in this case.

Section 212.06(9), Florida Statutes, provides:

> The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

The Florida Supreme Court specifically declined to determine any matter regarding an exemption for religious publications.[1]

Furthermore, Section 212.05(1)(i), Florida Statutes, is set out verbatim by Petitioners. However, Respondent asserts that the case also involves section 212.05(1)(a)1.a., Florida Statutes, which provides:

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[1] Department of Revenue v. Magazine Publishers of America, Inc., 565 So.2d 1304, 1305 n. 2 (Fla. 1990) (The opinion below is reprinted in Petitioners' appendix (App. A-1 - A-14) and the passage here relied upon can be found at App. A-2 - A-3); See also Petition for Writ of Certiorari (Petition), 5 n. 3.

> (1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:
>
> (a) 1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.[2]

Finally, Respondent asserts that this case involves sections 212.21(2), (3), Florida Statutes,[3] which sections state:

> **212.21 Declaration of legislative intent.-**
>
> (2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied

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[2] 565 So.2d at 1310 n.8, App. A-13 n. 8.

[3] 565 So.2d at 1310, App. A-13 - A-14.

and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption, or rental, or any of them exempted or attempted to be exempted from the tax or taxes or the operation or the imposition of the tax or taxes, shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption had never been included herein.

(3) It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses,

> storages, consumption, or rentals in relation to or in respect of the things set forth by this chapter as exempted from the tax to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes, except such sales, admissions, uses, storages, consumptions, or rentals as are specifically exempted therefrom by this chapter to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. (e.s.)

STATEMENT OF THE CASE

Respondent accepts Petitioners' Statement of the Case with the following exceptions and additions.

Prior to 1987, over-the-counter sales of magazines were taxed while subscription sales were exempt from

Florida tax. Chapter 57-821, section 1, Laws of Florida (1957).

REASONS FOR DENYING THE WRIT

In order to warrant a writ, there must be a "real or intolerable" conflict on the same matter of law or fact, and [not] merely an inconsistency in dicta. . . ." R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice, Section 4.3 (6th Ed. 1986). Respondent submits that the Petitioners do not present a substantial federal question, decided adversely to them by the Supreme Court of Florida below, which is in conflict with any other decision of a state court of last resort.

The Petitioners, consisting of a group of newspaper publishers, come before this Court in an unusual posture. The underlying basis of Petitioners'

argument is that the decision of the Supreme Court of Florida conflicts, pursuant to Rule 10.1(b), with the decision of another state court of last resort on the same federal question.[4]

The instant suit was brought by the Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation (collectively the "Magazine Publishers"). The Magazine Publishers argued that the differential taxation of magazines violates the federal and Florida constitutions. 565 So.2d at 1305, App. A-2. The Petitioners were intervenors below. Id. at 1304, n. 1, App. A-1.

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[4] The only arguably conflicting decision cited by Petitioners is Hearst Corp. v. Iowa Department of Revenue and Finance, 461 N.W. 2d 295 (Iowa 1990).

Petitioners' Statement of the Case argues that publishers of magazines brought suit "in the wake of recent decisions of this Court." Petition, 4. Respondent asserts that the Magazine Publishers were, as likely as not, reacting to the reinstatement of an exemption for newspapers by Chapter 87-548, section 26, Laws of Florida (1987), while magazine sales remained taxable.

With regard to the newspaper exemption, the trial court found it advanced no compelling state interest. App. A-18 - A-19. The Florida Supreme Court went so far as to state that it is "questionable" whether the interest which the Department did assert - promoting immediate dissemination of news - would survive even a rational relation analysis. 565 So.2d at 1308, App. A-9 - A-10.

Turning to the Department's contention below that the proper remedy to a finding of unconstitutional differential treatment was severance of the statute's newspaper exemption, the Florida Supreme Court built its decision on the proposition the First Amendment does not prohibit a tax on the press. 565 So.2d at 1305-1306, App. A-3.

The Florida Supreme Court concluded that the correct response in the case at bar under Florida law was elimination of the exemption.[5] In determining that resort to Florida law was appropriate, the Florida Supreme Court relied on this Court's opinion in the case of Texas Monthly, Inc. v.

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[5] Id. at 1309-1310, App. A-10 - A-12.

Bullock, 489 U.S. 1 (1989).[6]

The Florida Supreme Court found that Section 212.21, Florida Statutes, made its choice of remedy "unmistakably clear." 565 So.2d at 1310, App. A-14.

The Florida Supreme Court found that Florida's sales tax scheme unconstitutionally burdened First Amendment interests due to the differential treatment of magazines and newspapers. 565 So.2d at 1309, A-10 - A-11. The Florida Supreme Court ended the differential treatment complained of by the Magazine Publishers by severing

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[6] This Court stated:

"[i]t is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." Id. at 8.

the exemption granted newspapers. 565 So.2d at 1310-1311, A-14.

Neither the Department nor the Magazine Publishers have petitioned this Court for relief. The Department notes that the Florida Supreme Court opined that, given the asserted state interest, "[i]t is questionable whether this asserted interest would survive even a rational relation analysis." 565 So.2d at 1308, App. A-9 - A-10. The Department also relied below on the earlier case of Gasson v. Gay, 49 So.2d 525 (Fla. 1950). However, in the decision below, the Florida Supreme Court receded from its earlier decision in Gasson. 565 So.2d at 1309 n. 7, App. A-10 n. 7.

With regard to Petitioners' first question presented, the interest of the Newspaper Publishers is not that of one

denied a federal right. Enforcement of the judgment will not deprive the Newspaper Publishers of a right arising under the Constitution personal to themselves. They do not assert otherwise. Nor do the Newspaper Publishers have a duty to enforce state statutes giving rise to a personal interest in the litigation, thus creating a case or controversy. See Diamond v. Charles, 476 U.S. 54, 63-65 (1986).[7]

Moreover, an intervenor whose only interest is in the effect of the

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[7] Contrast, Newsweek, Inc. v. Celauro, 789 S.W. 2d 247 (Tenn. 1990), petition for cert. filed, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273), and Southern Living, Inc. v. Celauro, 789 S.W. 2d 251 (Tenn. 1990), petition for cert. filed, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90-273). Unlike the State of Tennessee, the Department has determined not to petition this Court for relief based upon the facts, circumstances and record of this case.

decision as a precedent may not seek certiorari as having an independent right which has been violated. Cf. Boston Tow Boat Company v. United States, 321 U.S. 632 (1944) (An intervenor without other interest than a desire to prevent a decision that might adversely affect its position in other litigation had no independent right violated by the decision adverse to another.) The Department asserts that precedential value forms the singular basis for the Newspaper Publishers' argument that this Court should grant its writ. Petition, 8-10.

The second question presented merely argues that the Newspaper Publishers are dissatisfied with the remedy provided to the Magazine Publishers pursuant to state law. However, the judgment of the Florida

Supreme Court on this point also does not collide with or deny any federal constitutional right held personally by the Newspaper Publishers.

The Florida Supreme Court determined, as a matter of Florida law, that severance of the exemption was, unmistakably, the clear choice. 565 So.2d at 1310, App. A-14. Assuming, for purposes of argument that the First Amendment mandates that the Magazine Publishers are entitled, as a matter of federal law, to elimination of the tax, it does not follow that the Newspaper Publishers are entitled to argue for the exclusivity of that remedy here. Only the Magazine Publishers might have petitioned this Court for review and thereafter claimed that the decision below did not afford them an appropriate and complete remedy to their challenge.

Thus, Petitioners' second question does not derive from a denial of the Newspaper Publishers' federal rights. Therefore, the Department respectfully suggests that this Court decline review. See Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 97 (1909); Diamond, supra.

Moreover, Respondent asserts that the second question presented is plainly unsubstantial. The remedy to the Magazine Publishers' challenge was appropriately determined as a matter of state law in light of the clear precedent of this Court. The unsoundness of Petitioners' second question presented results from the previous decision of this Court in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989).

Why then do Petitioners seek review? The unadorned effect of the

judgment upon the Newspaper Publishers lies in the invalidation of an exemption for newspapers granted by state law rather than its expansion to include magazines. Therefore, Petitioners - as newspaper publishers - might have asserted as injury the deprivation of some constitutional entitlement to a newspaper exemption. Clearly, however, the Newspaper Publishers do not even mention this, their only arguable injury.

It is submitted that Petitioners understand that in order to merit review they must raise a substantial federal question. See California Water Service Company v. City of Redding, 304 U.S. 252 (1938). The federal question which the Department would ascribe to the Petitioners' "injury" - whether newspapers are entitled as a matter of

federal law to a sales tax exemption - is plainly unsubstantial. Its unsoundness results from previous decisions of this Court.[8] Thus, the Newspaper Publishers' attempt to redraw the issues.

The case below did involve a challenge to a Florida statutory scheme that granted a sales and use tax exemption to newspapers similar to that granted in other states. The Florida Supreme Court affirmed the state trial court decision finding the differential treatment of newspapers and magazines unconstitutional just as most other state courts have done. However,

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[8] See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (dicta); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) (dicta); Branzburg v. Hayes, 408 U.S. 665 (1972) (dicta); Grosjean v. American Press, 297 U.S. 233 (1936) (dicta).

Florida declined to extend its newspaper exemption to magazines. It did not find that the tax on magazines was unconstitutional. Rather, it concluded that the correct response under Florida law was elimination of the exemption. It is that remedy to which the Newspaper Publishers now object.

Thus, the questions presented by Petitioners are not quite what they seem. The Florida courts, while determining to end differential treatment, choose to end the matter by striking an exemption. This solution was compelled by the overall purpose of the revenue measure and the stated intention of the Florida Legislature, which granted the exemption in the first instance.

What the Newspaper Publishers want, instead, is for this Court to

mandate that the Magazine Publishers receive no relief, or a different relief that protects the exempt status of newspapers. This demand suffers from serious shortcomings, among which is that the Newspaper Publishers have no federal right to a state sales tax exemption. Florida courts have decided to remedy the flaw and have acted well within the bounds of their authority in concluding that severance of the exemption was a sufficient remedy. Accordingly, the Department would respectfully request that the petition for writ of certiorari be denied.

CONCLUSION

The Petitioners do not present grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Therefore, Respondent

respectfully requests that the Petition be denied.

Respectively submitted,

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Dated: January ____, 1991.

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(3)

No. 90-904

in the Supreme Court of the United States

October Term, 1990

The Miami Herald Publishing Company, et al.,

Petitioners,

vs.

Department of Revenue, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Reply To Brief In Opposition To The Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

I. Does Florida's application of its sales and use tax to magazines but not to newspapers violate the First Amendment?

II. Assuming *arguendo* that Florida's application of its sales and use tax to magazines but not to newspapers violates the First Amendment, does the First Amendment require that the Florida sales and use tax as applied to magazines be invalidated?

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REASONS FOR GRANTING THE WRIT

In its Brief in Opposition to the Petition for Writ of Certiorari, the Florida Department of Revenue (the "Department") offers three reasons why the Newspapers'* petition should be denied. As explained below, none of these reasons is meritorious.

*Petitioners The Miami Herald Publishing Company, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company and Citrus Publishing Company, Inc. are referred to collectively herein as the "Newspapers."

First, the Department contends that the decision of the Supreme Court of Florida is not in conflict with the decision of another state court of last resort. Brief in Opposition at 6–7. This contention is palpably false. As the Department itself concedes, the Florida court's determination that the First Amendment proscribes the differential taxation of magazines and newspapers is in clear and direct conflict with Iowa's conclusion that such a taxation scheme is constitutionally permissible. *See Hearst Corp. v. Iowa Department of Revenue and Finance*, 461 N.W.2d 295 (Iowa 1990), *petition for cert. filed*, 59 U.S.L.W. 3519 (U.S. Jan. 29, 1991) (No. 90–1118); Brief in Opposition at 7, n.4. Likewise, Florida's decision that the correct remedy for differential taxation is the taxation of both magazines and newspapers is in clear and direct conflict with the Tennessee court's judgment that all such publications should be tax exempt. *See Newsweek, Inc. v. Celauro*, 789 S.W.2d 247 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90–273); *Southern Living, Inc. v. Celauro*, 789 S.W.2d 251 (Tenn. 1990), *petition for cert. filed*, 59 U.S.L.W. 3193 (U.S. Sept. 18, 1990) (No. 90–273).

Second, the Department argues that the Newspapers lack standing to contest the decision of the Supreme Court of Florida. Brief in Opposition at 11–13, 15–16. This argument, too, is frivolous. As this Court made clear in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722 (1987), a differential tax is the proper subject of a constitutional challenge. 107 S.Ct. at 1726. The fact that the press as a whole does not have an absolute right to be free from tax does not immunize a differential tax from constitutional scrutiny. *Id.* Moreover, the Newspapers' interest in seeking review of the decision of the Florida Supreme Court far exceeds the academic interest in "precedential value" urged by the Department. By its terms, the decision strikes the newspaper exemption from the Florida sales and use tax thereby subjecting newspapers to

the tax. The decision's adverse effect on the Newspapers is thus undeniable.

Finally, the Department contends that the decision below is not reviewable in this Court because it does not raise a substantial federal question. Brief in Opposition at 13–19. This contention must also be rejected. The petition pending before this Court presents two questions; both were decided adversely to the Newspapers by the Florida Supreme Court and both raise important federal constitutional issues. The first question concerns the propriety of a state sales tax which is differentially imposed on magazines and newspapers. The Florida Supreme Court clearly and expressly decided this question on First Amendment grounds. *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304, 1309 (Fla. 1990); App. A–10. Accordingly, this aspect of the decision below is clearly reviewable by this Court. *See* 28 U.S.C. §1257(a).

The second question presented by the Newspapers is whether the remedy for differential taxation of the press is constitutionally mandated by the First Amendment. In this regard, the Florida Supreme Court held that the remedy was a question of state law and invalidated the newspaper exemption pursuant to section 212.21, Florida Statutes. 565 So.2d at 1309–11; App. A–10–14. Because the court chose to rely on Florida law, the Department now argues that this aspect of the Florida court's decision rests on an independent and adequate state-law ground and is therefore unreviewable. This argument is mistaken. The question whether the choice of remedy is a matter of federal constitutional law or of state law is, in the first instance, a federal question. The fact that the Florida Supreme Court decided the issue as a matter of Florida law reveals that the court decided the federal constitutional question (of the applicability of the First Amendment) adversely to the Newspapers. Accordingly, this question is also properly

before this Court for review. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 109 S.Ct. 1248, 1252–53, n.4 (1989) (citing cases); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984).

CONCLUSION

For the reasons set forth in the Newspapers' petition for writ of certiorari and herein, the Newspapers respectfully request that the petition be granted or, in the alternative, that consideration of this case be stayed pending the Court's disposition of *Pledger v. Medlock*.

Respectfully submitted,

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